No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK
AND MELISSA ANN HOLYOAK,
Petitioners,

–v–

PALOMA GAOS,
ON BEHALF OF HERSELF AND ALL OTHERS
SIMILARLY SITUATED, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* SPECTRUM SETTLEMENT RECOVERY, LLC IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether it was an abuse of discretion under Fed. R. Civ. P. 23(e)(2) for a district court to approve a *cy pres* award of Fed. R. Civ. P. 23(b)(3) settlement proceeds where that court correctly concluded that administrative costs would so deplete available funds that class members would likely receive negligible payments, rendering a direct distribution infeasible.

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INTEREST OF AMICUS CURIAE

Spectrum Settlement Recovery, LLC ("Spectrum") is a third-party claim-filing company with years of experience recovering funds in Rule 23(b)(3) class actions.[1] Spectrum's experience includes many cases with truly vast classes—so-called "mega-class" settlements with tens of millions of class members.

Spectrum's primary business activity is to act as the agent of companies that are entitled to share in class action settlements. Spectrum collects and presents relevant corporate records and other evidence of loss to support its clients' claims and to maximize their recoveries. For this service, Spectrum is usually paid a contingent commission based on the client's recovery. Companies engage Spectrum because of its experience in recovering hundreds of millions of dollars of claims, an expertise seldom maintained by the companies themselves. Spectrum has represented more than 20% of the Fortune 1000 in this capacity in past and pending class action settlements over the last decade and a half.

Because Spectrum's business depends on direct distributions, our interest in the issues before the Court is closely aligned with those of class members: to obtain a direct monetary recovery whenever possible.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, this brief is filed with the consent of all parties.

Spectrum often intervenes, both representing specific corporate clients and also as *amicus curiae*, to expedite and maximize class recoveries, and also to encourage more transparent reporting of the claim filing process. Spectrum typically supports direct distributions to class members and generally opposes *cy pres* awards. At the same time, Spectrum recognizes that there are instances, like this case, where a *cy pres* award is the best practical solution to the challenges attendant to the distribution of comparatively small sums to massive numbers of class members.

While the parties to this action and other *amici curiae* have exhaustively briefed the case history and decisions of the lower courts discussing the standards that have been applied to class action *cy pres* awards, Spectrum respectfully submits that there is an important additional consideration that may properly inform the Court's deliberations. The record below and the briefs submitted thus far do not analyze how much class members would likely have received had a direct distribution been ordered in lieu of the approved *cy pres* award. Spectrum offers just such an analysis here, and does so relying on readily available data from this case, as well as its experience concerning the complexities and costs associated with identifying qualified class members, providing adequate notice, validating claims, and ultimately making distributions. Further, the analysis presented is supported by a survey of all known studies discussing class participation rates. All of these factors point to the inescapable conclusion that the district court's decision that a direct distribution was not feasible in this mega-class settlement was, in fact, correct.

SUMMARY OF ARGUMENT

The central issue in this case is not a matter of law that requires resolution by this Court. It is instead a purely factual question—did the district court abuse its discretion in approving a *cy pres* award after finding that a direct distribution of settlement proceeds to members of this class action was "infeasible" because it would confer, at best, a trivial economic benefit to the class?

Unfortunately, the district court did not conduct a public, detailed, evidence-driven analysis regarding the question of feasibility. Instead, it seems to have relied on its experience in similar cases and its awareness that the massive number of class members rendered the limited settlement funds insufficient to a meaningful distribution directly to class beneficiaries. And in affirming the district court's conclusion, the Ninth Circuit's decision did not enhance the admittedly thin record.

Nonetheless, reliable and readily available data exists from which one can easily conduct such an analysis. *Amicus curiae* Spectrum did just that, and its analysis demonstrates that the district court's summary finding of infeasibility is almost certainly correct. This is true even assuming only a small fraction (1% to 2%) of eligible class members bothers to submit claims. And the administrative costs of a slightly higher participation rate (3% or greater) would unquestionably render a distribution not just impracticable but financially impossible. Spectrum's analysis, summarized below, shows that it is likely that a direct

distribution would have paid class members less than $1, with administrative costs exceeding the amount paid as a direct distribution. The best case outcome would return approximately $2 each to class members. In the worst case scenario, the administrative costs of a direct distribution would wholly deplete (or even exceed) the available common fund.

In short, Spectrum's analysis shows that, whatever its deliberative process, the district court reached an eminently reasonable conclusion in finding that distribution of funds to class members would not be economically feasible. The circuit court deferred to this finding as within the lower court's discretion as the finder of fact, as should this Court. In this circumstance, Spectrum submits that the proper course now is for the Court to dismiss the writ as improvidently granted.

ARGUMENT

I. THE STANDARDS FOR DETERMINING WHETHER A *CY PRES* AWARD OF CLASS ACTION PROCEEDS IS PERMISSIBLE ARE NOT GENUINELY IN DISPUTE

It is broadly accepted that class members essentially have a property interest in class action settlement proceeds and are entitled to receive a direct distribution of their respective shares whenever such a distribution is "feasible." *See, e.g. In re Bank-America Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *In re Lupron Marketing and Sales Practices Litig.*, 677 F.3d 21, 32-33 (1st Cir. 2012).

A determination of feasibility requires a finding of fact by the district court that turns on case-specific considerations. While a number of court decisions have identified factors that ought to be considered, there is no universally accepted list or set of bright-line tests for feasibility, nor can there be.

Several courts have addressed the process for making this determination. In *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173-74 (3d Cir. 2013), the Third Circuit ruled that trial courts must make "a thorough analysis of settlement terms" and evaluate "the degree of direct benefit provided to the class." This process should include the size of the proceeds available for distribution compared to the number of potential claimants, the percentage of such claimants who are likely actually to file a claim and collect on it, and the likely costs of the required claims administration process. The Third Circuit emphasized that, if the parties do not provide it, the trial court should on its own initiative "affirmatively seek out such information." *Id.* at 174 (quoting *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 351 (3d Cir. 2010)). *See also In re BankAmerica Corp. Sec. Litig.*, 775 F.3d at 1067.

Petitioners attempt to frame a certiorari-worthy issue based on a purported split between the Ninth Circuit and other circuits, arguing that in the instant case, the Ninth Circuit imposed a rule that a direct distribution would be deemed infeasible unless all class members could receive a share of the proceeds. The Ninth Circuit did no such thing. While it observed, as did the district court, that a distribution to all class members would result in a negligible per member recovery (about $0.04 before considering the costs of

administering the distribution), it nowhere suggested—much less ruled—that this is the sole factor to be considered. Although the Ninth Circuit could have seized the opportunity to mandate specific factors to be evaluated and the weight to be assigned to them when evaluating the feasibility of a direct distribution, its failure to do so hardly constitutes a legal error that this Court is compelled to correct.

The issue instead is whether the district court abused its discretion in correctly finding that a direct distribution here would not be "logistically feasible and economically viable." *See Klier v. Elf Atochem North America Inc.*, 658 F.3d 468, 475 (5th Cir. 2011). It might well have been preferable for the district court to make more explicit its reasoning in reaching its finding of infeasibility. But its disposition of what is a highly fact-intensive issue does not warrant this Court's attention, where—as here—that decision is very likely correct and certainly not an error of sufficient magnitude to be reversible under the applicable abuse of discretion standard. Spectrum's neutral and clear-eyed consideration of the principal factors that go into such an analysis support a finding that a direct distribution to class members, in this case, would be illogical and economically irrational.

II. THE PRINCIPAL FACTORS TO BE CONSIDERED IN AN ANALYSIS OF THE FEASIBILITY OF A DIRECT DISTRIBUTION IN THE INSTANT CASE ARE NOT CONTROVERSIAL

The principal factors pertinent to a reasoned feasibility analysis in this setting are straightforward. First, the court must determine how much of the common fund will actually be available for distribution.

This amount is not just what remains of the whole fund after deducting attorneys' fees and litigation costs (in this case $5.3 million). The distribution process itself entails substantial costs, both fixed and variable, that must be deducted before determining the how much can be paid to the class. So in this case, $5.3 million is just the starting point in calculating how much can actually be distributed, which is inevitably a much lower figure. Second, the court must estimate the likely number of class members who will submit a valid claim: a number that will inevitably be a fraction of the total number of class members.

While most of the cost-related variables can be ascertained with some certainty by the trial court at the time it evaluates a proposed settlement, the likely percentage of class participation is less easily predicted. This is particularly true in mass consumer class actions where the identities and contact information of beneficiaries are unknown, and where the amount distributed even under the most favorable circumstances will be relatively small. Nonetheless, based on published data and an anecdotal consensus, the likely participation percentage here can be confidently estimated with sufficient accuracy to determine whether the district court abused its discretion in finding that distribution of the settlement fund to class members was not feasible.

Trial courts assess the factors relevant to feasibility either without a mandated formula or process in some circuits and with more guidance in other circuits. Regardless of local practice, some boundaries are obvious. As to economic feasibility—which is the controlling issue in this case—it quite clearly would be

infeasible to mandate a direct distribution to class members where the result would be grossly inefficient or wasteful. Spending $2 in administrative costs to distribute just one cent per participating class member would be nonsensical, and courts are not required to order irrational outcomes. There is no reason to believe that a small distribution would in any meaningful way compensate class members for their injuries. In these circumstances, a closely tailored *cy pres* alternative would be superior and likely of greater value to the class.

Trial courts frequently engage in precisely this sort of analysis when distributing class action funds. Some have employed the tactic of setting a minimum payment below which there will not be distributions. These courts have selected from a broad range of values based on their assessments of what low threshold is both rational and economically feasible considering the size of the class, the settlement fund, and costs of distribution. *See, e.g.*, *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 463-64 (E.D. Pa. 2008) (approving a $50 minimum payment); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02-1484, 2007 WL 4526593, at *12 (S.D.N.Y. Dec. 20, 2007) ($50 minimum payment required to efficiently administer the settlement fund); *In re Sprint Corp. ERISA Litig.*, 443 F.Supp.2d 1249, 1268 (D. Kan. 2006) ($25 *de minimis* threshold amount ruled fair); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y. 2004) ($10 *de minimis* threshold found reasonable); *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015 WL 758094, at *1 (N.D. Cal. Feb. 20, 2015) (granting final approval of a class settlement where claimants received up to $1.50 per uncorroborated

product purchase, up to a maximum of $24). Other courts have rejected imposing any low-dollar floor for participating class members, ensuring that every claimant receives something. In *In re Polyurethane Foam Antitrust Litigation*, the court ordered distributions as low as $1.50 on the thesis that "something is better than nothing." 168 F.Supp.3d 985, 999 (N.D. Ohio 2016) (quoting *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000, at *3 n.3 (N.D. Ohio July 12, 2010), *judgment vacated by Whirlpool Corp. v. Glazer*, 569 U.S. 901 (2013)). Even in that case, however, the court acknowledged that cases might exist where a low-dollar floor could be justified. *See id.* It is hard to envision imposing on trial courts a bright-line rule imposing a minimum dollar recovery beyond which distribution is not rational. Each case is entirely dependent on its particular facts.

In large class actions, substantial administrative costs attend the distribution of settlement funds. Because these costs are variable depending on participation, the resulting fund expenditures to notify claimants, process claims, and make payments can be wildly disproportionate to what class members may receive. For instance, a trial court faced with a range of participation outcomes may responsibly conclude that the best-case recovery would be $5 but that it was likely that any recovery would actually be impossible. If $4 million were technically available for distribution after paying fixed costs, but the cost of verifying the claim and mailing a check were $1 per claimant and 5 million class members file valid claims, this additional, variable cost of distribution

($5 million) would exceed by $1 million the funds available, resulting in no distribution to claimants.

The district court could, of course, determine definitively how much class members would receive by having counsel actually incur the costs of engaging a settlement administrator, providing notice to class members, and tallying the legitimate claims. But if, after these costs were incurred, this process demonstrated that no distribution would be feasible because class members' recovery had turned out to be zero or negligible, the result would be to significantly expend millions of dollars from the common fund with no benefit to class members. This exercise would affirmatively harm the class members since it would reduce the indirect benefits by leaving less for *cy pres* recipients. In a settlement where there is little upside to running such an experiment and substantial potential for loss, the district court should properly consider this risk in making its feasibility determination.

III. The Determination of Whether a Direct Distribution Is Feasible Rests with the District Court as the Trier of Fact and Is Reviewable Only for Abuse of Discretion

District courts, as the triers of facts, are charged with the responsibility to decide factual questions related to feasibility, including the likely participation rate and costs of distribution, and ultimately conclude whether a direct distribution is economically viable and rational considering the specific circumstances in the case. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d at 174. As *Klier* recognized, "Our decision lies comfortably with prior decisions of this Court

and our sister circuits, which have necessarily taken case-specific approaches to the role of the federal district judge in the distribution of monies left unclaimed after administration of a class settlement." 658 F.3d at 478.

The standard of review in considering whether to approve a proposed settlement of a class action was succinctly summarized in *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975), as being properly "left to the sound discretion of the district court." A circuit court will reverse the district court's approval of a class settlement only for a clear abuse of discretion. *E.g., Bryan v. Pittsburgh Plate Glass Co.* (*PPG Industries, Inc.*), 494 F.2d 799, 801 (3d Cir. 1974). And this Court typically will "not overturn a finding of fact accepted by two lower courts." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S.Ct. 2507, 2544 (2015).

While the district court's determination can be criticized for failing to demonstrate explicit findings on the various factors pertinent to feasibility—and in an appropriate case this Court would be justified in clarifying that district courts should make such findings—under a rational examination of the available data, the district court's ultimate finding that direct distributions are infeasible in this case is demonstrably correct.

The record shows that the district court initially based its finding of infeasibility on a simple mathematical evaluation, dividing the total settlement less attorneys' fees and litigation costs ($5.3 million) by the size of the entire class (129 million Google users

during the class period).[2] The resulting direct distribution from this equation would yield less than four cents per beneficiary. Of course, the four cents calculation fails to consider distribution costs, which would further reduce the distributable share. Conversely, this equation presupposes 100% class participation in the distribution, an assumption that is unsupported and insupportable. The court's simple exercise in division is of limited value, and the trial record does not show that the district court inquired into either (i) research regarding participation rates in comparable consumer class actions or (ii) the impact of administrative costs based on those projections.

Without conducting its own analysis, the Ninth Circuit held that the "district court's finding that the settlement fund was non-distributable accords with our precedent" on grounds that a distribution is "'infeasible' where each class member's individual recovery would have been '*de minimis*.'" Opinion at 9, *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017) (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012), *cert. denied sub nom. Marek v. Lane*, 531 U.S. 1003 (2013)).

Significantly, the Ninth Circuit's decision did not turn on some legal standard at odds with other circuit court decisions, a result that could justify Supreme Court review. Instead, it represented simple deference

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[2] The estimate of class members came from comScore (a company that provides Nielsen-like analytics of websites), which calculated that 129.9 million people visited Google's search website in the six months preceding the motion to preliminarily approve the settlement. Decl. of Richard W. Simmons, Docket Item No. 52-4, ¶ 25.

to a district court with extensive experience in large-scale technology-driven consumer class action matters. In fact, due to the centrality of Silicon Valley to the technology industry, the Northern District of California is arguably the epicenter of these technology-based, mega-class cases. Notwithstanding deficiencies in the lower courts' analytical approaches, Spectrum's independent analysis of the issue of feasibility strongly suggests that they reached the right result.

IV. DIRECT DISTRIBUTION OF THE GOOGLE REFERRAL SETTLEMENT FUNDS TO INDIVIDUAL CLASS MEMBERS IS ALMOST CERTAINLY NOT FEASIBLE

Ultimately, a determination of whether a relatively small settlement fund created in compensation for a mega-class can be feasibly distributed to the class turns on two factors. First, and most important, is an informed estimate of the likely recovery per class member. Second are the surrounding factors, including the perceived value of such recoveries by class members, the nature of the claimed harm, whether that harm can be ameliorated in any realistic sense by the size of the payment, and whether the alternative *cy pres* award is likely well designed to mirror the class's interests and ideally provide a genuine, albeit indirect, benefit to the class. Spectrum limits the discussion below to the first issue—the likely recovery per class member. If, as here, that recovery is sufficiently small —or indeed potentially zero—that alone strongly supports a finding of infeasibility. In this evaluation, Spectrum chose what are clearly extraordinarily conservative estimates as to costs and participation rates.

A. The Widely Accepted Approach to Evaluating What Class Members Would Likely Receive in a Direct Distribution

While requiring some informed estimation, the methodology for calculating a projected per class member recovery is not intrinsically complicated, and most of the information needed to do so is readily available. In the interest of assisting the Court in its consideration of this matter, Spectrum performed just such an analysis. Before we show our math, there are a few basic parameters that need to be understood.

In mega-class cases, the relationship between the class members and the defendant can have a material effect on the cost and effectiveness of notice, and also the cost of making actual distributions. There are basically three kinds of relationships:

1 Paid Subscriber

Where most class members are current, paid subscribers, a *cy pres* award is almost never justified. By way of example, a settlement resolving an over-charge by a phone company or cable TV provider involves class members who receive an ongoing bill for their subscription services against which settlement benefits can readily be credited. This allows for an "automatic distribution" where class members receive benefits without having to complete a claim form or even negotiate a check or other form of payment. There is essentially no cost in paying these class members. While notice is required for purposes of opting out or objecting to a settlement, once ready for distribution, there is no need for a claims filing process or further

notice. Class benefits as small as a few pennies can simply be credited against a subsequent bill.

2 Nonpaying Subscriber

Where class members are not routinely billed, but are non-paying subscribers to the defendant's service, the cost of claims administration can be substantially reduced. Facebook provides a good example here. Users do not pay for the service, and there is no way to simply credit funds back to them. But communicating the availability of funds is extremely easy. Defendants have class member email addresses or can otherwise "push" notice directly to the class. In nonpaying subscriber settlements, a broad notice ad campaign, mailed notice, and other administrative costs are not necessary, which substantially reduces the administrative costs of distributing the settlement proceeds. Because such notice costs and costs incurred in proving the eligibility of individual class members typically account for a substantial portion of the overhead costs, direct distributions in this setting are frequently feasible.

3 Unpaid User

The instant case involves an Unpaid User mega-class, where class members use an online service, but need not have an account or any further relationship with the service provider. Google's search engine is available to all comers, and for purposes of the instant action, no account is required. "An individual can run a Google search without logging into a Google account. Google also does not have addresses or similar identifying information for many Google account-holders." Respondent Google's Br.33 n.11. Identifying

class members in these cases is more difficult, making it harder to project notice costs and participation rates, but estimates can still be reached with a reasonable degree of confidence.

With a recognition of those parameters, and as applied to this case, the two key variables that control the per class member recovery—administrative costs associated with distributions and the expected participation rate—are discussed below.

B. The Costs That Affect Class Member Recoveries

In this case, $5.3 million remains in the common fund, after allowing for attorneys' fees, opt-out notice, and litigation costs, but these funds are not entirely available for distribution. Substantial costs are necessarily incurred in making a direct distribution. And these costs must be paid from the common fund and thus will deplete the money available for distribution. These costs can be divided into two classes—fixed and variable.

Fixed costs can broadly be grouped into (i) claims administration and (ii) notice. In virtually all direct distributions, courts must authorize hiring a professional claims administrator to create a claim form, establish a case database, build a settlement website, create an 800 number automated support system, and otherwise prepare for the influx of both valid and invalid claims. All of these costs must be expended before the first claim can be filed. There are also a number of fixed costs that are incurred during claims processing and at the end of the process, including tax reporting, the re-issuance of checks as required, skip tracing, account reconciliation, remailing undelivered

checks, and final declaration and reporting to the court and counsel. In a mass-class action such as this, a minimum estimate for claims administration activities from setup through completion would conservatively range between a quarter and a half million dollars. For this analysis, Spectrum used the low end of this range or $250,000.

Just as due process requires adequate notice prior to settlement approval (so that class members can object, opt out, and otherwise weigh in on the disposition of their legal interests), direct distributions typically require additional notice prior to claims administration to solicit claim submissions by class members. The cost of notice can be highly variable, and its results may be counter-intuitive. The more effective the notice—which typically requires a higher expenditure—the greater the likely number of class member who will participate, but the less of the common fund that remains available for payment to the class. Highly effective notice campaigns thus have the paradoxical effect of reducing per class member recoveries both by depleting the common fund and by increasing the number of claimants.[3] Here, the actual cost of preapproval settlement notice in this litigation provides a reasonable basis for estimating the cost associated with a second notice to solicit claims from the class. The record here shows that notice costs were approximately $855,539. Decl. of Richard W. Simmons, Docket Item No. 52-4, at Ex. 4-C. In fact, this level of expenditure is likely minimally

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[3] For a discussion of this "Goldilocks Dilemma," *see* Francis McGovern, *Distribution of Funds in Class Actions-Claims Administration*, 35 J. of Corp. L. 123-34 (2009).

sufficient to meet due process requirements and provide class members with a reasonable opportunity to participate in the settlement. If the common fund were substantially larger—say $20 million as in *Fraley v. Facebook, Inc.*, 966 F.Supp.2d 939, 943 (N.D. Cal. 2013)—an expenditure of $2 million or more would be easily justified, although it would increase participation and further lower what here would already be a tiny per class member recovery. The $850,000 (rounded down for convenience) estimated here would be spent on several forms of notice. Typically a press release is issued as a form of notice by publication. Beyond that, the vast majority of the money set aside for notice would go into banner advertising and social media outreach on platforms such as Facebook, Instagram, and Twitter.[4] Combined, the fixed costs in this action could be expected to total, at a minimum, $1.1 million ($250,000 for setup and $850,000 for notice).

Variable costs are those incurred on a claim-by-claim basis as forms are submitted by putative class members and typically account for the lion's share of incurred expenses in a direct distribution. The majority of variable costs fall into three specific categories. First, claims administrators charge a per claim fee to

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[4] Intuitively, it might be assumed that effective and inexpensive notice could be achieved by using Google's existing advertising placement platform to communicate with class members. In fact, this assumption is unfounded. Selling ads is the core of Google's business, and requiring Google to provide notice to class members for free would displace the ad space available for its paying customers resulting in an obvious loss of revenue for Google. Yet Google agreed to settle this action for $8.5 million, not $8.5 million plus millions of dollars more of in-kind free advertising.

process, verify, audit for fraud or duplication, and authorize payment of each valid claim form submitted, whether by mail or online. Second, since funds must be transmitted to each qualifying class member, physical checks must be printed, envelopes addressed, and appropriate supporting information included in the prepared distribution package. Third, checks are disbursed typically through the U.S. Postal Service, which charges postage on a per piece basis.

Claims administrators charge between 50 cents and $1 per processed claim; Spectrum's analysis below again uses the most conservative value at the bottom of that range which in this case is 50 cents. The cost of a printed check, addressed envelope, and the inclusion of basic information explaining the reason a recipient is receiving the check can range widely, but in no case would it be less than 30 cents, so that is the value included in Spectrum's calculations. Finally, the easiest value to include is first class U.S. Mail, which costs 42 cents per piece. Added together, the minimum variable costs amount to $1.22 per compensated class member.

C. Participation Rates

The second key factor affecting the size of the payment available for distribution to qualifying class members is the participation rate, that is, the likely percentage of the eligible class that will actually file a viable claim for a share of the fund. Plainly, the larger the number of viable claims submitted, the smaller the available payout per claimant. If the participation rate is high enough—and it need not be very high in a mega-class action like this one—the associated administrative costs that will need to be

expended in the distribution will swallow the entire available fund, leaving a net deficit and creating, by definition, an infeasible distribution.

A natural way to estimate participation rate is by reference to similar cases.[5] Unfortunately, data on participation rates is rare.[6] But there is research, both academic and commercial, that can be used to estimate likely participation rates in cases such as this. One leading claims administration firm reported claim filing rates ranging between 2% and 20% in consumer cases.[7] Another study, cited by Petitioners

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[5] While research on participation rates is limited, all such work suggests low filing rates in consumer class actions. Perhaps the most comprehensive survey of reported participation rates was conducted by Brian Fitzpatrick and Robert Gilbert in *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J. L. & Bus. 767 (2015). The survey reported a participation rate of between 1% and 70% in 15 "small stakes consumer class actions lawsuits." *Id.* at 770.

[6] As an active participant in the class action arena, if there were one change Spectrum could impose, it would be to require mandatory reporting of claim filing results at the end of cases. Requiring trial courts to report the results of the claims distribution process, including specifically participation rates, could only further the interests of justice by providing future courts with more accurate, reliable indices predictive of participation rates which are so essential to any judgment regarding whether a direct distribution is practical and thus whether an all *cy pres* payment is consistent with Rule 23(e)(2).

[7] Tiffany Janowicz, Anticipating Claims Filing Rates in Class Action Settlements (Mar. 2013), *available at* https://perma.cc/7FV3-KJKY (reporting ranges of 2-20% in consumer cases, 20-35% in securities cases, and 20-85% in employment cases). *See also* Fitzpatrick and Gilbert, *supra* note 5, at 776 n.34 (citing same study).

here, was conducted by the Mayer Brown law firm (the "Mayer Brown Study")[8] at the behest of United States Chamber of Commerce as part of the Chamber's advocacy against consumer class actions. While subject to the risk of bias, given its sponsor,[9] the Mayor Brown Study produced a median participation rate of 1.5%. Though not definitive, the Mayer Brown 1.5% participation rate appears representative of the consensus that consumer class action settlements like this one typically see low participation rates and are likely to be at the low end of the spectrum. Thus, Spectrum is comfortable relying on the Mayer Brown Study's median participation rate of 1.5% and uses this in its analysis for purposes of demonstrating the likely recovery by class members in this case.[10]

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[8] *See* Mayer Brown LLP, Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions, (Dec. 11, 2013), https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

[9] "In light of the duty of law firms to zealously represent their clients' viewpoints, we do not put the same stock in the Mayer Brown study, of course, as we do in academic studies. Nonetheless, the study collected data using neutral criteria, and we have no reason to believe that the data were reported in a biased manner." Fitzpatrick and Gilbert, *supra* note 5, at 776.

[10] Other studies found significantly higher participation rates. *See* Fitzpatrick and Gilbert, *supra* note 5, at 770. As demonstrated *supra*, rates much above 2% would result in no distribution to class members, making use of the lower Mayer Brown Study median rate a more useful basis for analysis.

D. The Results of Spectrum's Analysis

Using as a baseline the values discussed above, at a 1.5% participation rate, class members in this case would be expected to receive less than $1 each.

Number of Class Members	129,000,000
Participation	1.50%
Number Participants	1,935,000
Common Fund Pool	$5,300,000
CLAIMS ADMINISTRATOR SETUP	
Fees	$250,000
Notice	$850,000
VARIABLE COSTS	
Printing @ $.50 each	$580,500
Postage @ $.42 each	$812,700
Net Fund Available	$1,839,300
Payment per Participant	$0.95

Spectrum further evaluated the likely per claimant recovery by assuming a participation rate .5% below and above the Mayer Brown Study median rate of 1.5%. Thus, if the participation rate was as low as 1%, the payment would rise to $2.04 per participant.

Number of Class Members	129,000,000
Participation	1.00%
Number Participants	1,290,000
Common Fund Pool	$5,300,000
CLAIMS ADMINISTRATOR SETUP	
Fees	$250,000
Notice	$850,000

VARIABLE COSTS	
Printing @ $.50 each	$387,000
Postage @ $.42 each	$541,800
Net Fund Available	$2,626,200
Payment per Participant	$2.04

If, on the other hand, the rate reached 2%, each participant's share would shrink to $0.41.

Number of Class Members	129,000,000
Participation	2.00%
Number Participants	2,580,000
Common Fund Pool	$5,300,000
CLAIMS ADMINISTRATOR SETUP	
Fees	$250,000
Notice	$850,000
VARIABLE COSTS	
Printing @ $.50 each	$774,000
Postage @ $.42 each	$1,083,600
Net Fund Available	$1,052,400
Payment per Participant	$0.41

In each of these examples, the costs of administering the claims process and distribution of funds would exceed the amount actually distributed to class members.

There is a foreseeable outcome that is much worse. The results in the above tables are premised on an expectation that there would be a relatively low level of class member participation. Given that Google has among the highest profiles of any possible consumer

class action defendant, and in light of the relatively large $15 payments in *Fraley v. Facebook* which may well have convinced consumers that they could realize substantial benefits from online privacy class actions against the largest technology companies,[11] it would not be irrational to project participation to be at least somewhat above the high end of the presented range. A participation rate just slightly higher—even 3%—would result in negative $0.13 per class member, rendering any distribution impossible. Regardless of whether one assumes the high, low, or median participation rate, what is immediately apparent is that the recovery per class member here would be at best vanishingly small and may even be zero.

In short, while the district court might not have conducted a rigorous, transparent analysis of whether the likely recovery per class member rendered a direct distribution infeasible, it is evident that even using extrordinarly conservative estimates as to costs and participation rates, such an analysis would show that the court almost certainly got it right. Best case, the amount available for distribution to each qualified claimant would be economically insignificant. It is nearly certain that a distribution, in this case, would fall below the threshold of minimum payments adopted by courts across a number of circuits. Particularly given the alternative—a well-targeted *cy pres* award where the funds might at least provide an indirect benefit to the class—the district court's finding that a

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11 *See A Check From Facebook Might Be Heading Your Way—But Don't Get Too Excited*, Fortune, Nov. 24, 2016, http://fortune.com/2016/11/23/facebook-checks-sponsored-story-payout-advertising-class-action/.

direct distribution to claimants would be infeasible cannot be considered an abuse of discretion.

Thus, this case is the wrong vehicle to consider whether a district court abused its discretion in authorizing a *cy pres* award. It would not be inappropriate, of course, for this Court to remand to the district court with instructions to conduct its own detailed finding as to the likely recovery (if any) per class member and transparently disclose its factual findings. But Spectrum submits that based on the available data the Court could and should just as reasonably conclude that this would be a fruitless exercise in light of the analysis provided here and instead dismiss the writ as improvidently granted.

CONCLUSION

For the foregoing reasons, amicus curiae Spectrum Settlement Recovery, LLC, respectfully submits that the Court should dismiss this writ as improvidently granted.

Respectfully submitted,

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